Supreme Court, U.S.
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No. 88-1691

In The

Supreme Court of the United States

October Term, 1988

STERLING DRUG, INC.,

Petitioner,

v.

CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE GARY A. GERLACH, JUDGE, PRESIDING, JACQUELINE FOX, A MINOR, BY HER GUARDIAN AD LITEM, ROBERT L. HABUSH, GARY FOX, AND JUDITH FOX,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN OR, ALTERNATIVELY, FOR A WRIT OF MANDAMUS

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Sec. 804.01(2), Wis. Stats.

(2) SCOPE OF DISCOVERY. Unless otherwise limited by order of the court in accordance with the provisions of this chapter, the scope of discovery is as follows:

(a) *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

* * *

(c) *Trial preparation: materials.* 1. Subject to par. (d) a party may obtain discovery of documents and tangible things otherwise discoverable under par. (a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Sec. 808.03(1), Wis. Stats.

808.03 Appeals to the court of appeals. (1) APPEALS AS OF RIGHT. A final judgment or a final order of a

circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment or order entered in accordance with s. 806.06(1)(b) or 807.11(2) or a disposition recorded in docket entries in ch. 799 cases or traffic regulation or municipal ordinance violation cases prosecuted in circuit court which disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding.

Sec. 809.10(4), Wis. Stats.

(4) MATTERS REVIEWABLE. An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon.

Sec. 809.71, Wis. Stats.

809.71 Rule (Supervisory writ). A person may request the supreme court to exercise its supervisory jurisdiction over a court and the judge presiding therein or other person or body by filing a petition in accordance with s. 809.51. A person seeking a supervisory writ from the supreme court shall first file a petition for a supervisory writ in the court of appeals under s. 809.51 unless it is impractical to seek the writ in the court of appeals. A petition in the supreme court shall show why it was impractical to seek the writ in the court of appeals or, if a petition had been filed in the court of appeals, the disposition made and reasons given by the court of appeals.

Sec. 905.03(2), Wis. Stats.

905.03 Lawyer-client privilege.

* * *

(2) GENERAL RULE OF PRIVILEGE. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: (a) between himself or his representative and his lawyer or his lawyer's representative, or (b) between his lawyer and the lawyer's representative, or (c) by him or his lawyer to a lawyer representing another in a matter of common interest, or (d) between representatives of the client or between the client and a representative of the client, or (e) between lawyers representing the client.

COUNTERSTATEMENT OF THE CASE

On page 9 of its petition for a writ of certiorari, the petitioner claims that in responding to the request of respondents Jacqueline Fox, Gary Fox and Judith Fox (hereinafter the "respondents") for production of documents, it asserted that 1,026 documents "were subject to (1) attorney-client privilege, (2) attorney work product privilege and/or, (3) first amendment privileges, including the right to associate and to petition the government." This is not an accurate statement.

The motion by the respondents which eventually culminated in the issuance of the circuit court order of November 10, 1988, was a motion to compel complete responses to a number of the respondents' discovery requests, including requests for production of documents, which motion was filed in September of 1987. A number of briefs and affidavits were subsequently filed, but it was not until approximately June 15, 1988, that the petitioner finally identified the nature of the privileges it

claimed with respect to the 1,026 documents. The petitioner filed a two-page document entitled "CATEGORIES OF PRIVILEGED DOCUMENTS," which listed eleven categories of documents as being privileged. (See A55-A56) Contrary to the assertion on page 9 of the petition for a writ of certiorari, the petitioner did not claim a First Amendment privilege with respect to all of the documents. First Amendment privileges were asserted only with respect to categories 6 and 7. The privileges asserted were the "academic freedom privilege" and the "Noerr-Pennington doctrine; First Amendment." (See A55-A56) The other documents were claimed to be protected from disclosure by the attorney-client privilege and the work product doctrine only.

The petitioner would have this Court believe that the privileged nature of all 1,026 documents is before the Court. In fact, no decision was made by the circuit court concerning the privileged nature of the documents in categories 1, 3-A and 5-A, and the circuit court did not order documents in those categories to be turned over to the respondents' counsel. Rather, the circuit court gave the petitioner another opportunity to demonstrate why the documents in those categories were protected from disclosure by the attorney-client privilege. (See A51-A52)

In discussing, on pages 7-8 of the petition for a writ of certiorari, the activities which it undertook subsequent to November 7, 1980, the petitioner would have the Court believe that the issue of whether the documents which were generated by the petitioner are privileged under the attorney-client privilege or the work product privilege is before this Court. In fact, in its petition, the petitioner has not disputed the determination of the circuit court that

the documents generated by it did not meet the requirements of those privileges. The only issues it has raised concern the privileged nature of (1) documents which evidence communications relating to the Aspirin Foundation of America ("AFA") and the Proprietary Association, which are documents in categories 2, 3-B, 4-B, 5-B, 9 and 10, and (2) documents regarding government petitioning, association and speech, which are documents in category 7. Any issue concerning the privileged nature of the documents in categories 1, 3-A, 4-A, 5-A, 6, 8 and 11 is not before this Court.

Although the circuit court ruled in its November 10, 1988 decision and order that the documents which it found to be non-privileged were to be turned over to the respondents' counsel on November 28, 1988, those documents were not actually provided to the respondents' counsel on that date. On the motion of the petitioner, the Wisconsin Court of Appeals issued a stay of the order for production, pending the disposition of the petition for leave to appeal which the petitioner had filed in that court. The petition for leave to appeal was denied on September 24, 1988. The circuit court subsequently set another date for the production of the non-privileged documents to the respondents' counsel. By order of the Wisconsin Supreme Court dated December 22, 1988, the production of the documents was again stayed, pending the disposition of the petition for a supervisory writ which the petitioner had filed in that court. In denying the petition for a supervisory writ, the Wisconsin Supreme Court vacated the stay of the circuit court order. (A28-A31) The petitioner then filed a motion in the circuit court for a stay of the enforcement of that court's order of

November 10, 1988, pending the filing and deciding of a petition for a writ of certiorari to this Court. In a hearing held on February 8, 1989, the circuit court denied the motion for a stay. The circuit court judge then took counsel for the parties into its chambers and showed them where the non-privileged documents were, and indicated that counsel could make their own arrangements for copying of the documents. The petitioner's counsel requested that he be given an opportunity to place a stamp on each of the documents to indicate that they were confidential and protected by the terms of the circuit court's protective order. After the documents were so stamped, they were taken by petitioner's counsel and respondents' counsel to respondents' counsel's office for copying on February 9, 1989. At no time between November 10, 1988 and February 9, 1989 did the petitioner or its counsel make any effort to prevent the physical production of the documents to the respondents' counsel. The petitioner did not inform the circuit court of any intention by the petitioner to disobey the court's order of November 10, 1988, and to thereby risk the imposition of a contempt order.

There is no support for the statement in footnote 1 of the petition for a writ of certiorari that the circuit court led the petitioner to believe that the documents which were submitted to the court for *in camera* inspection would be returned to the petitioner before any actual production. The circuit court did not engage in any deception or subterfuge, as the petitioner seems to imply. The circuit court never indicated at any time that it would return to the petitioner the documents which it determined to be non-privileged.

REASONS FOR DENYING THE WRIT

I. THIS COURT HAS NO JURISDICTION OVER THIS CASE.

The petitioner has asserted that this Court has jurisdiction over this case pursuant to 28 U.S.C. §1257 and 28 U.S.C. §1651. The petitioner has, however, failed to meet the requirements necessary to invoke the jurisdiction of the Court.

A. This Court Has No Jurisdiction Under 28 U.S.C. §1257.

The petitioner seeks the issuance of a writ of certiorari to review the decision and order of the circuit court dated November 10, 1988, pursuant to 28 U.S.C. §1257(a). In order for this Court to have jurisdiction to consider a petition for a writ of certiorari under that statute, a number of requirements must be satisfied. Those requirements are not met in this case.

1. No decision has been rendered by the highest court of the state.

Under 28 U.S.C. §1257(a), this Court can only review final judgments or decrees "rendered by the highest court of a State in which a decision could be had." It has been recognized by this Court that a litigant must exhaust all opportunities for review by the state courts before it will hear a matter. *Gorman v. Washington University*, 316 U.S. 98 (1942). To satisfy this requirement, the party seeking review must invoke the jurisdiction of the highest court in the state having either obligatory or discretionary power to review. *Sandquist v. California*, 419 U.S. 1066

(1974); *Banks v. California*, 395 U.S. 708 (1969); *McMaster v. Gould*, 276 U.S. 284 (1928); *Stratton v. Stratton*, 239 U.S. 55 (1915). This prerequisite is not satisfied where the highest court of the state refuses to review because a proper state appellate procedure was not observed. *Gotthilf v. Sills*, 375 U.S. 79 (1963); *Hammerstein v. Superior Court of California*, 341 U.S. 491 (1951).

In the case before the Court, the Supreme Court of Wisconsin refused to grant the petition for a supervisory writ which the petitioner had filed in that court because the proper state procedure set forth in sec. 809.71, Wis. Stats., had not been followed.

Sec. 809.71, Wis. Stats., provides that a person who requests the Wisconsin Supreme Court to exercise its supervisory jurisdiction must first file a petition for a supervisory writ in the lower appeals court. In this case, the petitioner failed to comply with that statute, because it failed to file a petition for a supervisory writ in the Wisconsin Court of Appeals before it filed its petition for a supervisory writ in the Wisconsin Supreme Court. The failure to comply with the statute was the sole basis for the Wisconsin Supreme Court's denial of the petition, as is clear from the following portion of that court's order dated February 1, 1989:

> On December 21, 1988 Sterling Drug, Inc. filed a petition seeking a supervisory writ prohibiting the circuit court for Milwaukee county, the Hon. Gary A. Gerlach, presiding, from enforcing its November 10, 1988 order requiring the petitioner to produce for inspection by an adverse party in litigation pending in that court certain documents the petitioner claims are privileged.

> The petitioner did not first seek supervisory relief in the Court of Appeals; rather, it petitioned the Court of Appeals for leave to appeal the trial court's discovery order. On December 14, 1988, having concluded that the petitioner failed to meet the criteria for permissive appeal, the Court of Appeals denied leave to appeal.
>
> * * *
>
> IT IS ORDERED that the petition of Sterling Drug, Inc., for a writ of prohibition is denied *ex parte*, pursuant to secs. (Rules) 809.71 and 809.51, Stats.

(A28-A29)

It is evident from the Wisconsin Supreme Court's order that the court refused to consider the merits of the petition for a supervisory writ because the petitioner had failed to properly invoke the jurisdiction of that court by utilizing the proper state procedure. Since the petitioner failed to properly invoke the jurisdiction of the Wisconsin Supreme Court, there is no decision of the "highest court of the state" from which the petitioner can seek review in this Court.

The AFA filed a petition for a supervisory writ in the Wisconsin Court of Appeals, and that petition was denied. However, the denial of the AFA's petition did not and could not excuse the petitioner from complying with the requirement of sec. 809.71, Wis. Stats. Nor would the denial of the AFA's petition have rendered futile the filing in that court of a petition for a supervisory writ by the petitioner. The AFA's petition addressed only the privileged nature of the AFA-related documents. The petition for a supervisory writ which the petitioner filed in the Wisconsin Supreme Court, however, addressed the privileged nature of all of the documents which were

ordered to be produced, not just the AFA-related documents. If the petitioner had filed a petition for a supervisory writ in the Wisconsin Court of Appeals, it would presumably have addressed the same issues which were addressed in the petition which it filed in the Wisconsin Supreme Court. Since that petition would thus have been broader in scope than the petition which the AFA filed, the Court of Appeals' denial of the AFA's petition would not necessarily have been determinative of the action that court would have taken on the petitioner's petition.

2. There is no final judgment.

The jurisdiction of this Court under 28 U.S.C. §1257(a) to review a decision of a state court depends upon the existence of a "final judgment or decree" by the highest court of the state. Even if this Court concludes that there has been a judgment of the highest court of the state of Wisconsin, it must be concluded that such a judgment is not final.

It is generally recognized that pretrial discovery rulings are not final, but are interlocutory in nature. *Alexander v. United States*, 201 U.S. 117, 121-22 (1906). The general rule is that a party not wishing to comply with a discovery order must refuse to comply with the order and risk being held in contempt before it may appeal or otherwise seek review of the order. *United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *Cobbledick v. United States*, 309 U.S. 323 (1940); *Alexander v. United States, supra.*

In this case, the petitioner did not refuse to comply with the circuit court discovery order. Rather, it obeyed

the terms of the order and turned over to the respondents' counsel all of the documents which the court had held to be non-privileged. Therefore, the order from which the petitioner seeks review is not a "final judgment" for purposes of 28 U.S.C. §1257(a), and the Court has no jurisdiction.

The petitioner attempts to invoke the jurisdiction of this Court by relying on exceptions to the rule prohibiting review of interlocutory judgments. None of these exceptions is applicable here.

a. The *Perlman* rule.

The petitioner's first contention is that this case falls within an exception created by *Perlman v. United States*, 247 U.S. 7 (1918). The *Perlman* rule provides that a discovery order is final for purposes of review or appeal whenever the order requires a third party to produce information or documents, and the third party cannot be expected to risk a contempt order merely to protect the aggrieved party's appeal rights.

The *Perlman* rule is inapplicable here. *Perlman* applies only if its application will prevent the disclosure of the information sought to be protected. If the information has already been disclosed, the reason for expedited review no longer exists. *Perlman* is thus inapplicable because the petitioner has provided the respondents with all of the documents found by the circuit court to be non-privileged.

Another reason the *Perlman* rule is inapplicable is that the circuit court order was not addressed to a third

party. Rather, it was addressed to the petitioner, who is a party in this case, and it required the petitioner to turn over to respondents' counsel documents which were generated by the petitioner.

The petitioner, however, asserts that the *Perlman* rule is applicable because the circuit court had possession of the documents after it conducted an *in camera* inspection of the documents to determine whether they were privileged. Apparently, the petitioner claims that the circuit court is a "third party" for purposes of the *Perlman* rule.

It cannot be concluded that a trial court who has possession of documents which are the subject of a discovery order is a third party in the context of the *Perlman* rule. The third party to which the *Perlman* rule applies must be a "stranger to the proceeding" before the court. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 356 (1931). The court which issued the discovery order can hardly be considered a "stranger to the proceeding." Moreover, the *Perlman* rule provides that the discovery order must be directed to the third party. In this case, since the discovery order came from the court, it can hardly be considered as being directed to the court. Furthermore, the reasoning behind the *Perlman* rule does not support the application of the rule in this case. The reason for the rule is that if the Court were to deny review of a discovery order which is directed to a third party, then the aggrieved party would be left "powerless to avert the mischief of the order," in view of the fact that the third person could not be expected to risk a contempt citation in order to create for the aggrieved party an opportunity for review. *Perlman v. United States*, 247 U.S. at 13. Thus, the third person must be one who has the ability to resist

the discovery order, if he so desires, and be cited for contempt. In this case, the circuit court cannot be a third person for purposes of the *Perlman* rule, since the court could hardly be in a position to resist its own order and risk the issuance of a contempt citation by itself.

In this case, the petitioner could easily have resisted the production of the documents which were governed by the circuit court's order. Instead of doing so, it allowed the documents to be provided to respondents' counsel.

In relying on the *Perlman* rule, the petitioner also fails to take into account that this Court has allowed an exception to the principle of *Alexander v. United States* only "in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." *United States v. Ryan*, 402 U.S. at 533. The usual application of the *Perlman* rule is where the aggrieved party's motion or petition is the only proceeding pending in any court. See *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 514 (1975); *Go-Bart Importing Co. v. United States*, 282 U.S. at 356; *Perlman v. United States*, *supra*.

However, the case before the Court is an ongoing civil case and the discovery order of which the petitioner seeks review is merely one step in that proceeding. Any unfair use of the documents which were ordered produced under the circuit court's order can be corrected on appeal from a final judgment in the case. If the appellate court determines that the documents are privileged, it can grant the petitioner a new trial and, to assure that no use of the documents is made on re-trial, the court can order the respondents' counsel to withdraw from representation of the respondents. Denial of immediate review

requested by the petitioner would not "render impossible any review whatsoever." *United States v. Ryan*, 402 U.S. at 533. Therefore, it must be concluded that the *Perlman* rule does not apply to render "final" the circuit court's discovery order in this case.

b. The collateral order doctrine is not applicable.

In addition to relying on the *Perlman* rule, the petitioner also attempts to establish jurisdiction under the collateral order doctrine. See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949). In order for this doctrine to apply, the interlocutory order must (1) conclusively determine the disputed question; (2) resolve an important issue separate from the merits; and (3) be effectively unreviewable on appeal from a final judgment. *Stringfellow v. Concerned Neighbors in Action*, ___ U.S. ___, 107 S.Ct. 1177, 1181-82 (1987), citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). This Court has generally denied review of pretrial discovery orders. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981); *United States v. Ryan*, 402 U.S. 532. The collateral order doctrine is inapplicable, since the circuit court's discovery order is reviewable on appeal from a final judgment entered in this case.

In arguing that the collateral order doctrine is applicable here, the petitioner relies upon *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). In that case, the Court identified four categories of cases in which jurisdiction is proper even when there are further proceedings anticipated in the state court. The only category into which the petitioner claims that this case falls is the third category. In that category are cases:

> [W]here the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review.

420 U.S. at 481.

The instant case does not fit into this category. If this Court were to decline review at this time, and the petitioner were to subsequently lose this case on the merits, the Wisconsin Rules of Appellate Procedure would permit the petitioner to appeal, as of right, from the final judgment entered in this case and to raise, as of right, the issues which are presented to this Court. See secs. 808.03(1) and 809.10(4), Wis. Stats.

Relying upon *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987), the petitioner asserts that this Court must take jurisdiction because if it does not, the documents will have lost their confidential status and the petitioner will be irreparably harmed.

The petitioner will not be irreparably harmed if this Court does not take jurisdiction. The documents which are at issue have already been provided to respondents' counsel, and the harm, if there is any, has already been done. Moreover, any harm which the petitioner has sustained by disclosure of the documents can be rectified on appeal from the final judgment entered in this case. If, on appeal, the documents are determined to be privileged,

the reviewing court will be compelled to grant the petitioner a new trial, and because the respondents' knowledge of the documents cannot be eradicated, the appellate court would have to order respondents' counsel to withdraw from representation of the respondents. Thus, the petitioner will be entitled to a new trial and that proceeding will be entirely unaffected by the earlier disclosure of the documents.

The petitioner claims that the production of the documents does not moot the questions presented here because there are other product liability cases similar to this case pending against the petitioner, and thus allowing discovery in this case could result in discovery in the other cases. To the contrary, however, production of documents in this case will have absolutely no affect upon any other case pending against the petitioner. The only order in this case which has addressed the issue of whether the documents are privileged is the circuit court order of November 10, 1988. The order has not been published and has absolutely no precedential value. Moreover, as the petitioner is well aware, there is a protective order in effect in this case which prevents the respondents, their counsel, their experts and other representatives from revealing any discovery documents or their contents to anyone who is not assisting respondents' counsel in the preparation of this case. (See A8-A11) Therefore, there is no chance that the documents or their contents will be revealed to any person who is unrelated to this litigation and, thus, production of the documents in this case will have no adverse affect upon the petitioner's defense of other similar product liability lawsuits.

The purposes of the requirement of 28 U.S.C. §1257(a) that this Court only review final judgments and decrees are well established, and include notions of avoidance of piecemeal review of state decisions, efficiency, judicial restraint and federalism. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). As evidenced by the cases cited above, this Court has consistently applied a strict test of finality to determine the reviewability of state pretrial discovery orders. If this Court were to accept jurisdiction of this case under the collateral order doctrine, then this would mean that any state court order compelling the discovery of documents claimed to be privileged would be reviewable, even if the documents were already produced to the opposing party. Such a result would seriously undermine the finality requirement.

3. There is an independent and adequate state ground supporting the state court's decision.

It is well-established that this Court will not review a judgment of a state court which rests upon adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). Failure to abide by a state procedural requirement constitutes an adequate state ground, if the state has consistently and repeatedly enforced such requirement. *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982); *Wolfe v. North Carolina*, 364 U.S. 177 (1960).

In this case, the Wisconsin Supreme Court never reached the merits of the petition for a supervisory writ which the petitioner had filed in that court, because the petitioner had failed to comply with the requirement of

sec. 809.71, Wis. Stats., that a person requesting the Wisconsin Supreme Court to exercise its supervisory jurisdiction must first file a petition for a supervisory writ in the lower appellate court. The Wisconsin Supreme Court did not reach any federal question, but denied the petition for a supervisory writ solely on the ground that the petitioner had failed to comply with sec. 809.71. There is nothing in the record which would indicate that the Wisconsin Supreme Court has not consistently and repeatedly enforced the requirements of sec. 809.71. Consequently, there is an adequate state ground for the Wisconsin Supreme Court's decision, and this Court has no jurisdiction to review that decision. What was said in *John v. Paullin*, 231 U.S. 583 (1913), is equally applicable here. There the Court stated:

> As the supreme court of the state did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the state, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. . . . Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.
>
> Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law.
>
> * * *

> [I]t appears that nothing was decided but the preliminary question of the court's jurisdiction to pass upon the controverted matters shown in the record, and that this question was resolved according to what the court deemed to be the true construction and effect of applicable provisions of the Constitution and laws of the state. In short, the judgment of dismissal turned entirely upon a question of local law.

231 U.S. at 585-86. See also *Wolfe v. North Carolina, supra.*

When there can be no pretense that the state court sought to evade a constitutional issue, and the case was decided upon grounds unrelated to any federal question, this Court must accept the decision. *Wolfe v. North Carolina,* 364 U.S. at 195, citing *Nickel v. Cole,* 256 U.S. 222, 225 (1921).

4. The federal questions were not raised in or decided by the state court.

In order for this Court to have jurisdiction to review a state court decision pursuant to 28 U.S.C. §1257, it must affirmatively appear from the record that a substantial federal question was presented to the state court and was passed upon by that court. *Bankers Life and Casualty Co. v. Crenshaw,* ___ U.S. ___, 108 S.Ct. 1645, 1651-52 (1988); *Webb v. Webb,* 451 U.S. 493, 498-501 (1981); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969).

When the respondents moved the circuit court to compel production of the documents withheld by the petitioner, the petitioner argued that it was not required to produce those documents because they were privileged. The petitioner argued that the documents were privileged under the attorney-client privilege, the work product privilege, the academic freedom privilege and the *Noerr-Pennington* doctrine. In its order of November

10, 1988, the circuit court did not order the production of several documents which were claimed by the petitioner to be protected by the attorney-client privilege. Rather, because the petitioner had failed to specify its claim of privilege, the circuit court gave the petitioner another opportunity to establish that the documents it withheld were actually protected by the attorney-client privilege. (See A51-A52) With respect to other documents claimed by the petitioner to be protected by the attorney-client privilege, the trial court determined that those documents were not protected because they did not meet the requirements of the privilege. (See A42-A45) Similarly, many of the documents claimed to be protected by the work product privilege, with the exception of documents which were prepared in anticipation of specific litigation, were held not to be work product because they failed to meet the requirements of the work product doctrine. (See A47-A51) Other documents claimed by the petitioner to be protected by the academic freedom privilege and the *Noerr-Pennington* doctrine were ordered to be produced to the respondents, because Wisconsin does not recognize such doctrines and, in any event, the documents did not meet the requirements of those doctrines. (A53)

The petitioner now raises four issues for review by this Court. Essentially, those issues relate to the petitioner's First Amendment right to associate with other corporations, with other members of a trade association, with its own employees and selected expert consultants; the petitioner's right to due process of law; and the petitioner's First Amendment right to petition the federal government. With the exception of the issue concerning the petitioner's right to petition the federal government, none of the issues which the petitioner now raises was

ever raised in the circuit court. The petitioner never argued that if the circuit court were to order production of the allegedly privileged documents, that the court would violate the petitioner's right to associate or its right to due process. As is clear from the Defendant's Brief In Support Of Privileged Documents (See A98-A119), the only arguments which the petitioner presented in opposition to the respondents' motion to compel discovery were arguments that the documents met the requirements of the attorney-client privilege, the work product privilege, the academic freedom privilege and the *Noerr-Pennington* doctrine. With the exception of the petitioner's arguments concerning the academic freedom privilege and the *Noerr-Pennington* doctrine, no constitutional issues were ever raised. Therefore, this Court has no jurisdiction to consider any of the petitioner's arguments concerning its right to associate and its right to due process.

B. This Court Has No Jurisdiction Under 28 U.S.C. §1651.

The petitioner requests that this Court issue a writ of mandamus pursuant to 28 U.S.C. §1651. A writ can only be issued under that statute in aid of this Court's jurisdiction. As demonstrated above, this Court has no jurisdiction to consider the petition for a writ of certiorari. Therefore, it cannot issue a writ of mandamus.

Moreover, the remedy of mandamus is a drastic one to be invoked only in extraordinary situations. The party seeking issuance of a writ of mandamus must satisfy the burden of showing that his right to the issuance of a writ is clear and indisputable. *Kerr v. U.S. District Court For*

Northern District of California, 426 U.S. 394, 403 (1976). The petitioner has made no such showing in this case.

II. THE CIRCUIT COURT'S ORDER DID NOT IMPLICATE THE PETITIONER'S RIGHT TO ASSOCIATE WITH OTHER ASPIRIN MANUFACTURERS.

If the Court determines that it has jurisdiction, the petition for a writ of certiorari should be denied, because the petitioner has not raised an important federal question warranting review by this Court.

The petitioner's claim that the circuit court denied to the petitioner its First Amendment right to associate with other aspirin manufacturers has no support in the record. The circuit court was not asked to address any issue concerning the parameters of the petitioner's right to associate with other aspirin manufacturers. As discussed above, the petitioner made no claim in the circuit court that its First Amendment right to associate with other manufacturers would be violated if the circuit court were to order production of the documents evidencing communications by AFA members or representatives. The petitioner's only claim was that such documents were protected by the attorney-client privilege and the work product doctrine. (See A55-A56) The petitioner has no right to assert a First Amendment privilege as to such documents at this juncture.

Moreover, the decision and order of the circuit court does not deny, and cannot be interpreted to deny, the petitioner's right to associate with other corporations. The order does not in any way prohibit the petitioner from associating with other corporations, it does not impose liability upon the petitioner for its associational activities with other corporations, and it does not state or

imply that the communications among members of a trade association must always be disclosed in discovery proceedings or that the attorney-client and work product privileges do not apply to trade associations or their members. The circuit court applied the attorney-client and work product privileges in the same manner as those privileges would be applied in any case not involving a corporation or trade association, and held that the AFA-related documents were not protected from disclosure by either privilege, because the documents did not meet all of the requirements of those privileges. The basis for the circuit court's ruling that the AFA-related documents were not protected by the attorney-client privilege was the fact that the documents failed to meet the requirements of sec. 905.03(2), Wis. Stats., the Wisconsin attorney-client privilege rule, that (1) the communications between an attorney and client must be made "for the purpose of facilitating the rendition of professional legal services to the client," and that (2) the communications must be "confidential." (See A42-A45) The basis for the circuit court's ruling that the AFA-related documents did not constitute work product was the fact that the documents failed to meet the requirements of sec. 804.01(2)(c), Wis. Stats., the Wisconsin work product rule, that (1) the documents be "prepared in anticipation of litigation," and that (2) the documents be prepared "by or for [a] party or by or for [a] party's representative." (See A47-A51) The petitioner does not claim that the circuit court's application of the attorney-client privilege or the work product doctrine was erroneous.

Thus, the circuit court did not rule, as the petitioner seems to claim, that documents evidencing communications between corporate members of trade associations

are never protected from disclosure. The circuit court order only indicates that communications among corporations and members of trade associations, like communications among individuals, are not protected from disclosure in discovery proceedings unless they meet the requirements of an established privilege. In this case, they did not.

The petitioner is essentially arguing that requiring a corporation to produce documents which evidence communications with other corporations, but which fail to meet the requirements of any established privilege, violates the corporation's First Amendment right to associate. The petitioner claims that it has a First Amendment right to keep confidential every communication which it makes with another corporation or its representatives, regardless of the nature of the communication and regardless of whether the communication meets the requirements of an established privilege. This Court has never recognized that First Amendment rights are so broad. If the Court were to accept the petitioner's argument, the Court would be giving rights to corporations and associations which are greater than any rights which have been recognized with respect to individuals, since communications among individuals which do not meet the requirements of an established privilege are subject to disclosure. Moreover, if the Court were to accept the petitioner's argument, it would effectively abrogate the discovery rules. Under such a ruling, a corporate party, when requested in a discovery proceeding to disclose the substance of a written or oral communication with another corporation, would be entitled to prevent disclosure merely by claiming that the disclosure of the communication would violate its First Amendment right

to speak and to associate. Such a ruling would virtually eliminate any opportunity for meaningful discovery against a corporation, since a corporation could always insulate information from discovery merely by communicating the information to another corporation.

The petitioner asserts that the parties' only objective in this case is to prove or disprove the existence of a relationship between aspirin use and Reye's Syndrome. The petitioner thus claims that documents evidencing its assessment of the data concerning that relationship are irrelevant to this action, and that, therefore, the respondents should be denied access to such documents, since their desire to obtain such documents is based upon an ulterior motive.

The petitioner's view of this case is distorted. The respondents' obvious objective in this case is to prove liability on the part of the petitioner – to prove that the petitioner was negligent in failing to issue warnings of the relationship between aspirin use and Reye's Syndrome. Proving the existence and nature of that relationship is only one step in this process. In order to establish a claim for negligence, the respondents must also establish that the petitioner was aware of the risk that its product could cause Reye's Syndrome. One method of proving knowledge on the part of the petitioner is to obtain documents evidencing this knowledge. Therefore, documents showing the petitioner's assessment of the data concerning the relationship between Reye's Syndrome and aspirin use are highly relevant to the respondents' claims in this case.

Documents evidencing the petitioner's knowledge of the data are relevant to establish that it was foreseeable to the petitioner that children using aspirin had a risk of

developing Reye's Syndrome. Documents evidencing the petitioner's assessment of the data and activities which the petitioner undertook in response to the data are relevant to establish negligence on the part of the petitioner. Such documents are also relevant as showing admissions on the part of the petitioner that there is a causal relationship between aspirin use and Reye's Syndrome and admissions of negligence on the part of the petitioner.

The respondents do not wish to obtain access to the documents for the mere purpose of eavesdropping on the petitioner and its corporate associates, but to obtain evidence which is relevant and necessary to prove liability on the part of the petitioner. Permitting the respondents to discover non-privileged documents evidencing the knowledge of and communications by the petitioner for the purpose of establishing liability of the petitioner does not offend the First Amendment.

III. THE *NOERR-PENNINGTON* DOCTRINE IS COMPLETELY INAPPLICABLE TO THIS CASE.

The petitioner's claim that this Court should accept review of this case to define the parameters of the *Noerr-Pennington* doctrine is without merit. The doctrine, which was developed in the anti-trust context, generally applies in cases where liability is sought to be imposed on the basis of lobbying and petitioning activities. It is completely inapplicable in this case.

Eastern R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and their progeny essentially hold that an anti-trust violation cannot be predicated upon efforts to influence the government to pass or enforce laws, to influence administrative agencies to take

certain action, or upon actions in the courts, even though such efforts are designed to injure competitors.

Clearly, the *Noerr-Pennington* doctrine is inapplicable to this case, since this is not an action in which the respondents have alleged that the petitioner violated the Sherman Act, laws against unfair trade practices, laws against conspiracy or similar laws. Nor are the respondents attempting to impose liability on the petitioner on the basis of its lobbying or petitioning activities. The respondents are merely claiming that the petitioner is liable for its failure to issue a warning concerning the association between aspirin use and Reye's Syndrome.

Moreover, even if the respondents were attempting to impose liability on the petitioner for its lobbying and petitioning activities and the *Noerr-Pennington* doctrine were arguably applicable, the application of that doctrine would not absolutely preclude the discovery sought by the respondents. In *United Mine Workers v. Pennington*, 381 U.S. at 670, n. 3, this Court made clear that evidence of *Noerr* conduct may be introduced at trial, at the discretion of the trial judge, to show the purpose and character of other conduct. This Court stated:

> It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the established judicial rule that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends to reasonably show the purpose and character of the particular transactions under scrutiny.

This rule is controlling in this case. Under that rule, the respondents would be entitled to offer evidence of the petitioner's lobbying or petitioning activities as evidence

to support their allegations of a continuing course of outrageous conduct on the part of the petitioner of which such activities were just one small part. Accordingly, the respondents cannot be absolutely precluded from discovering any information concerning the petitioner's petitioning or lobbying activities.

The petitioner has cited no case to this Court in which the *Noerr-Pennington* doctrine was applied to discovery proceedings in a products liability action. In an effort to convince the Court that the doctrine should apply in the context of this case, the petitioner cites three lower court cases which, the petitioner states, have held that there can be no discovery of documents relating to a party's petitioning activities with the government. The three cases cited by the petitioner, none of which is a products liability case, are inapposite. *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987), and *Australia/Eastern/USA v. United States*, 537 F.Supp. 807 (D.D.C. 1982), were both anti-trust cases. *Britt v. Superior Court of San Diego County*, 20 Cal.3d 844, 574 P.2d 766, 143 Cal.Rptr. 695 (1978), did not involve the application of the *Noerr-Pennington* doctrine, but rather, involved the rule of *NAACP v. Alabama*, 357 U.S. 449 (1958), recognizing constitutional protection of anonymity of affiliation, which is not involved in this case.

Of the 1,026 documents which were claimed by the petitioner to be privileged, only 14 were claimed to be protected from disclosure by the *Noerr-Pennington* doctrine. Counsel for the respondents have read the documents and they are of no real significance. Their production certainly does not warrant review by this Court merely on the unsubstantiated claim by the petitioner that the *Noerr-Pennington* doctrine applies to them.

IV. THE PETITIONER'S REQUEST FOR THE ESTABLISHMENT OF CONSTITUTIONAL BOUNDARIES FOR DISCOVERY PROCEEDINGS IN PRODUCT LIABILITY LITIGATION IS WITHOUT SUPPORT.

The petitioner's request for the establishment of boundaries for discovery proceedings in multi-party product liability litigation has no basis in the Constitution.

Discovery proceedings in multi-party product liability litigation, like any other civil litigation, are governed by rules set up by the individual courts. There is no reason for this Court to question the application of those rules, unless the application somehow offends the Constitution.

In this case, the circuit court ordered production of many of the documents withheld by the petitioner, because the circuit court determined that the documents failed to meet the requirements of the attorney-client privilege or the work product privilege. The petitioner has not claimed in this Court that the circuit court was incorrect in concluding that the documents failed to meet those requirements. Rather, what the petitioner apparently claims is that when the application of state discovery rules, as limited by the attorney-client and work product privileges, in multi-party product liability litigation results in a conclusion that the manufacturer must produce information which it desires to keep from the hands of its adversary, such application offends the Constitution.

The petitioner claims that the application of discovery rules to a manufacturer in mass product liability litigation prevents the manufacturer from speaking freely,

because the manufacturer's communications may be disclosed to victims of its defective products. The petitioner requests this Court to somehow recognize a new privilege on behalf of product manufacturers to prevent their adversaries from ever discovering any of the manufacturers' communications about their products, so as to prevent the victims from ever proving the manufacturers liable for injuries caused by those products. This request has absolutely no support in the Constitution and certainly does not warrant review by this Court.

CONCLUSION

This Court has no jurisdiction over this case under 28 U.S.C. §1257(a) or 28 U.S.C. §1651. There is no constitutional basis for the recognition of a privilege on behalf of a product manufacturer to preclude disclosure, in discovery proceedings, of communications made to its representatives or other manufacturers about its product, when those communications fail to meet the requirements of an established privilege.

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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